not regularly attend at places appointed for worship? Again, does the clause refer to the religion of the beneficiary at the date of the settlement and what of the infant beneficiary who might be brought up in one religion by a guardian and change it on reaching maturity? I must point out that this case is in no way similar to *Hodgson v. Halford*[2] where there was provision against embracing a particular faith — my reason for finding this condition invalid is simply the practical impossibility of ascertaining whether in fact anyone ever had changed his religion. I thus answer prayer one of the summons in the affirmative.

Clause 8 (a) (ii) is similarly in my judgment void for uncertainty. For how long must a beneficiary "reside" outside the Hydramout before he is disqualified? Does "reside" mean "live"? Quite apart from these considerations, however, the case of *Sifton v. Sifton*[1] is exactly in point and the *in terrorem* doctrine in my opinion, would apply. Prayer 2 is thus answered in the affirmative.

Clause 8 (a) (iii) is even more uncertain and *in terrorem*. What, for example would be the position of a beneficiary who attempted to set aside a gift made by the trustees in error to a beneficiary who in fact was unentitled? Again, how can the trustees ascertain what is an "attempt" to set aside the provisions of the deed? Would a letter written by a solicitor on a beneficiary's instructions questioning the trustee's action amount to an attempt? Frankly I do not see where the line can be drawn and I answer prayer 3 in the affirmative.

This leaves for disposal simply the charitable trusts referred to in prayers 17 and 19 of the summons. As regards the former I should unhesitatingly have held it bad had the purpose apparent from the deed, not been charitable. Such trusts, however, may be interpreted with far greater leniency than ordinary trusts and the class of people who might benefit under this provision are almost without number when one appreciates that the "kin and kindred and/or all such persons in any wise related to the settlor or his family" are entitled to benefit under the settlement. Similarly as this is a charitable trust I do not think that the condition of residence in the Hydramout for the purpose of this clause is uncertain. What the settlor intended in this part of the deed was to make provision for his family's poor relations in Arabia by way of "Wakaf" and in effect he has gone much further than this by leaving the door open to persons "who are in any wise related" to him or to members of his family. This is not, as I see it, in the nature of a private or family benefaction but one which is open to a large section of the community. I would thus distinguish this case from *In re Compton*[3] where in any event the facts were different — as here, unlike there, it was not a condition that the beneficiaries be needy. The facts of this case are nearer to *In re Scarisbrick*[4]. I answer prayer No. 17 of the summons that this is a good charitable trust.

The remaining trusts in Clause 6 (b) I also hold to be good. Mr. Munro takes exception only to certain words in Clause 6 (b) (ii) and does not dispute the remaining sub-clauses. I do not think that Clause 6 (b) (ii) is bad for uncertainty. The Settlor intended to benefit certain schools in Arabia in which children were given both religious and ordinary education. I do not think that the introduction of the words "other places of instruction" — unhappy though no doubt, they are — suffice to make the clause bad for uncertainty. I thus hold all the trusts enumerated in Clause 6 (b) to be good charitable trusts.

Order accordingly.

Solicitors for the trustees: *Sisson & Delay.*
Solicitors for the plaintiffs: *Mallal & Namazie.*
Solicitors for the defendant: *Allen & Gledhill.*

KUNA SOCKALINGAM MUDALIAR v. YANG SARIPAH & ANOR.

**[C. A. (Wilson, Buhagiar and Good, JJ.)
October 24, 1953]**

[K.L. — F.M. Civil Appeal No. 21 of 1953]

Practice and Procedure — Civil Procedure Code, ss. 241, 343 and 344 — Judgment debtor summons — Whether process constitutes execution.

In 1941 the appellant obtained judgment against the two respondents and another for $4,703, interest and costs. In 1953 the appellant, having obtained leave to execute the decree against the two respondents, took out a judgment debtor summons under section 343 of the Civil Procedure Code.

The judgment debtor summons came on for hearing before the learned Chief Justice in the presence of the appellant and the second respondent. It did not appear that the first respondent was present but this was immaterial. At the hearing the second respondent produced an affidavit sworn by himself which purported to show that he had paid the appellant $5,500 in 1944, in full settlement of the decree and produced a receipt to that effect. It was recorded that the plaintiff admitted the receipt but said there was another case. The learned Chief Justice dismissed the summons with $200 costs to the second respondent.

Before the Court of Appeal it was argued by Mr. Edgar for the appellant:—

(1) that the learned Chief Justice should have given the appellant an opportunity to file an affidavit in reply to that of the second respondent;

(2) that the learned Chief Justice ought not to have accepted the affidavit, referred to above, as showing satisfaction of the decree;

(3) that the learned Chief Justice ought to have examined the second respondent under the provisions of section 344 of the Civil Procedure Code.

Held: (1) as the appellant was present at the hearing and there was no suggestion that he had asked for a postponement in order to file an affidavit in reply to that of the second respondent or that he had asked to

examine the second respondent on his affidavit, provided that the affidavit was admissible to show satisfaction of the decree, there was no possible point in examining the second respondent under section 344 of the Civil Procedure Code if the Court was satisfied, as it was, that the decree has already been satisfied; (2) the words "shall not be recognised.....by any Court executing the decree" in section 241(iii) of the Civil Procedure Code must be taken to mean what they say, and that the prohibition contained in the subsection applied only in cases where the decree-holder had applied for execution of the decree. It follows that if the Court was satisfied at the hearing of the judgment debtor summons that the amount due had in fact been paid, it must be empowered to refuse to examine the debtor as to his ability to pay a debt which had already been paid.

Cases referred to:—

(1) *Ahna Lana Velathan v. Vina Chinniah & Anor.* (1939) M.L.J. 34.

(2) *In re Watson* (1893) 1 Q.B. 20.

(3) *Montgomery & Co. v. De Bulmes* (1898) 2 Q.B. 420.

(4) *Bundy v. Motor Cab Owner Drivers' Association & Ors.* (1930), 143 L.T. 334.

CIVIL APPEAL.

M. Edgar for the appellant.

Ng Ek Teong for the respondents.

Cur. Adv. Vult.

Wilson, J.: —In 1941 the appellant obtained judgment against the two respondents and another for $4,703, interest and costs. In 1953 the appellant, having obtained leave to execute the decree against the two respondents, took out a judgment debtor summons under section 343 of the Civil Procedure Code.

The judgment debtor summons came on for hearing before the learned Chief Justice in the presence of the appellant and the second respondent. It does not appear that the first respondent was present but this is immaterial. At the hearing the second respondent produced an affidavit sworn by himself which purported to show that he had paid the appellant $5,500 in 1944 in full settlement of the decree and produced a receipt to that effect. It is recorded that the plaintiff admitted the receipt but said there was another case; whatever that may mean I do not know. The learned Chief Justice dismissed the summons with $200 costs to the second respondent.

Before us it has been argued by Mr. Edgar for the appellant:—

(1) that the learned Chief Justice should have given the appellant an opportunity to file an affidavit in reply to that of the second respondent;

(2) that the learned Chief Justice ought not to have accepted the affidavit, referred to above, as showing satisfaction of the decree;

(3) that the learned Chief Justice ought to have examined the second respondent under the provisions of section 344 of the Civil Procedure Code.

The appellant was present at the hearing of the judgment debtor summons and there is no suggestion that he asked for a postponement in order to file an affidavit in reply to that of the second respondent, or that he asked to examine the second respondent on his affidavit.

In these circumstances, provided that the affidavit was admissible to show satisfaction of the decree, there was no possible point in examining the second respondent under section 344 of the Civil Procedure Code if the Court was satisfied, as it was, that the decree had already been satisfied.

As to whether or not the learned Chief Justice was entitled to find on the affidavit that the decree had already been satisfied, the sole question in my opinion depends on whether or not a Court before which a judgment debtor summons comes up for hearing is a Court executing a decree. If it is a Court executing a decree it is, to my mind, clear that any payment to which it refers cannot be recognised as a payment or adjustment of the decree by reason of section 241 (iii) of the Civil Procedure Code. However, we were referred to the judgment of Mills, J., in *Ahna Lana Velathan v. Vina Chinniah & Anor.*[1]. In this case Mills, J., held that procedure by way of a judgment debtor summons under section 343 of the F.M.S. Civil Procedure Code is not execution. In the course of his judgment he referred to the case of *In re Watson*[2], in which the Master of the Rolls and two Lords Justices held that the procedure under the Debtors Act, 1869, which corresponds to the procedure under sections 342 to 346 of the Civil Procedure Code, is not execution. He also referred to the case of *Montgomery & Co. v. De Bulmes*[3], and, in my opinion, correctly stated that two Judges of the Court of Appeal had impliedly stated in that case that the procedure under the Debtors Act, 1896 is not execution. Mills, J., then referred to the case of *Bundy v. Motor Cab Owner Drivers' Association & Ors.*[4], in which a Divisional Court of two Judges held that this procedure is execution. Mills, J., came to the conclusion that the procedure by way of a judgment debtor summons under section 343 is not execution and, in my opinion, rightly so for the following reasons. Primarily, on the hearing of a judgment debtor summons, the judgment debtor is to be examined respecting his ability to pay the decree and for discovery of property applicable to such payment. The object of that procedure, it seems to me quite clearly, is to ascertain, prior to taking execution proceedings, whether they are likely to succeed. It is true that under section 345 of the Code the Court may imprison the judgment debtor or order him to pay by instalments and order that upon default of payment

of any instalment the debtor shall be committed to the civil prison. Under section 346 of the Code it is expressly provided that any imprisonment under section 345 shall not operate as a satisfaction or extinguishment of a decree. Clearly, imprisonment under this section is not execution.

It remains only to consider whether or not an order to satisfy a decree by paying in instalments is execution. In my opinion it is not and it is merely a variation of the decree which is, in effect, an order for a defendant to satisfy the amount of the decree with interest and costs by one lump sum payment forthwith. That order, in my opinion, cannot be regarded as execution of the decree nor do I think that a subsequent variation of that order for payment by instalments can be regarded as execution.

For these reasons I would dismiss this appeal with costs.

Buhagiar, J. : — I have had the advantage of reading the judgments of Wilson, J. and Good, Ag. J., with which I agree. I would only add that the Code of Civil Procedure of the Federated Malay States, which is modelled on the Indian Civil Procedure Code, differs substantially from the latter Code in the modes of execution. Under Order 21 rules 30 and 31 which deal with "decree for payment of money" and "decree for specific moveable property" a decree may be executed by the detention in the civil prison of the judgment debtor or by the attachment and sale of his property, or by both. In Sections 275 and 278 of the Civil Procedure Code of the Federated Malay States, which correspond to the abovementioned provisions of the Indian Civil Procedure Code, no provision is made for the execution of a decree by the detention of the judgment debtor. It is clear, therefore, that imprisonment of the judgment debtor is not a mode of execution.

Good, J. : — This appeal was argued on the following three grounds only :—

(a) that the learned Chief Justice ought not to have dismissed the summons without giving the Appellant an opportunity to file an affidavit in reply to the affidavit filed by the second Respondent;

(b) that the learned Chief Justice ought not to have admitted the affidavit filed by the second Respondent, the same not having been ordered under section 212 of the Civil Procedure Code, but ought to have examined him under section 344; and

(c) that the learned Chief Justice ought not to have recognised the satisfaction of the decree, such recognition being contrary to the provisions of section 241(iii) of the Civil Procedure Code.

As to (a): the appellant was present at the hearing, and had an opportunity, which he did not exercise, of cross-examining the second respondent, who was also present, on the matters contained in his affidavit. He could also have applied for a postponement to enable him to file a counter-affidavit, or he could have sought the leave of the Court to give oral evidence, but he did neither. This ground of appeal therefore fails.

As to (b): with regard to the argument based on section 212, the section clearly gave the Court power to admit the affidavit of the second respondent. With regard to the argument based on section 344, the object of the examination of the judgment debtor under section 344(i) of the Civil Procedure Code is to discover what means, if any, the judgment debtor has of satisfying the decree. If the Court is satisfied that the amount due under the decree has been paid, the question of examining the judgment debtor as to his ability to pay cannot arise. It is necessary, therefore, to consider only ground (c), that is, whether the Court was entitled to recognise the satisfaction of the decree as evidenced by the affidavit of the second respondent and the receipt annexed thereto.

Section 241 of the Civil Procedure Code lays down the procedure for recording the satisfaction of a decree. In this case neither the appellant nor the respondents took any action to have the payment of $5,500 recorded by the Court as provided by that section. The appellant relies on sub-section (iii), which provides :—

"A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised as a payment or adjustment of the decree by any Court executing the decree."

The question is, can a Court giving effect to the procedure laid down in section 344 for the examination of a judgment debtor as to his ability to satisfy the decree be said to be a "Court executing the decree"?

Counsel for the respondents referred us to the case of *Velathan v. Chinnah & Anor.*[1], in which Mills, J. held that the procedure by way of judgment debtor summons under section 343 of the Civil Procedure Code is not execution within the meaning of section 568. The learned Judge referred to a number of English authorities which decided the question whether the procedure under section 5 of the Debtors Act, 1869, is execution. That section lays down a procedure by way of judgment summons for the examination of a judgment debtor on oath, the ordering of the payment of the decretal amount by instalments, and the committal of the judgment debtor in default, which so closely resembles the procedure laid down in sections 342 — 346 of the Civil Procedure Code that the latter provisions are manifestly based upon it.

In *In re Watson*[2], it was held that the procedure by judgment summons under the Debtors Act, 1869, was not "execution" of the judgment debt within the

meaning of section 4 of the Judgments Extension Act, 1868. Esher, M.R., says at pp. 23 — 24 :—

"Section 4 says that the English Court is to exercise over a registered Irish judgment the same jurisdiction as it has over an English judgment, 'but in so far only as relates to execution under this Act.' The appellants have endeavoured to get rid of the words 'under this Act.' But, even if those words are omitted, the power of the Court is limited to 'execution.' Is the power which is conferred by section 5 of the Debtors Act, 1869, of committing a defaulting debtor to prison, 'execution'? It has been expressly decided in **Stonor v. Fowle**, 13 A.C. 20, that it is not, and the point hardly needed authority. Moreover, section 5 of the Debtors Act expressly provides that, when the creditor has done all that he can to enforce the remedies given to him by that section, his right to execution on the judgment remains untouched. It is as clear as can well be that the power of committing a debtor, or of ordering him to pay by instalments, is not 'execution,' and, if so, the Judgments Extension Act does not authorize the Court to employ that power for the purpose of enforcing an Irish judgment registered in England."

Lopes, L.J., says, at pp. 24 — 25 :—

"It seems to me impossible to say that the procedure by judgment summons under the Debtors Act is 'execution under this Act,' that is, under the Act of 1868. Indeed, I think it is not 'execution' at all. It was decided in **Stonor v. Fowle**, 13 A.C. 20, that such a proceeding is in its nature punitive, and is not a mere mode of enforcing payment of the debt. It cannot, therefore, be 'execution.' Then section 5 of the Debtors Act says, that 'No imprisonment under this section shall operate as a satisfaction of any debt, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.' It is clear, therefore, that if proceedings are taken under the Debtors Act, and an order for committal is made, and the debtor is imprisoned for six weeks, the right of 'execution' still remains, and a fi. fa. can issue upon the judgment, if the debtor has any goods. This makes it quite plain that this proceeding under the Debtors Act is not 'execution' under the Act of 1868."

In *Montgomery & Co. v. De Bulmes*[3], it was held that if a creditor, who has recovered judgment against his debtor in the High Court, afterwards obtains from a county court judge an order under section 5 of the Debtors Act, 1869, for payment of the debt by instalments, he cannot, so long as that order is in force, issue execution upon his judgment in the High Court. In the course of his judgment Chitty, L.J., says, at p. 423 :—

"In this case the plaintiffs did not see their way to obtaining execution, and they thought that this (i.e. putting in motion section 5 of the Debtors Act, 1869) was the best way of getting their money."

Clearly, therefore, the learned Lord Justice was of the same opinion as the Court in the earlier case, that the procedure under section 5 of the Debtors Act, 1869, is not execution. Collins, L.J., agreed with this opinion.

In a later case, however, a contrary opinion was expressed. In *Bundy v. Motor Cab Owner Drivers' Association & Ors.*[4], it was held *inter alia* that procedure by judgment summons is a mode of enforcing a judgment and directly in connection with the action, as distinguished from a bankruptcy petition, which is not. The following words appear in the judgment of Talbot and Finlay, JJ., at p. 336 :—

"The section (i.e. section 5 of the Debtors Act, 1869) empowers the court to direct a judgment debtor to pay by instalments. It is plain that this procedure is in truth a form of execution introduced by successive statutes in connection with the abolition in all ordinary cases of the old execution by caveat. It is a mode of enforcing the judgment."

Mills, J., in the case of *Velathan v. Chinniah*[1], considered the earlier decisions the weightier authorities and followed them. I respectfully agree. I think that it is perfectly plain that what is known locally as the procedure by judgment debtor summons is not execution, but a method of discovery only. It may be followed by execution if sufficient assets are discovered; or resort to execution may be avoided if the judgment debtor pays the decretal amount by instalments; or the decree-holder may not proceed to execution if no assets are discovered.

I considered that the words "shall not be recognised ..... by any Court executing the decree" in section 241 (iii) of the Civil Procedure Code must be taken to mean what they say, and that the prohibition contained in the sub-section applies only in cases where the decree-holder has applied for execution of the decree. It follows that if the Court is satisfied at the hearing of the judgment debtor summons that the amount due has in fact been paid, it must be empowered to refuse to examine the debtor as to his ability to pay a debt which has already been paid.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellant : *Bannon & Bailey.*

Solicitors for the respondents : *Braddell & Ramani.*

LOW MOH & ANOR. v. PUBLIC PROSECUTOR.

[A. Cr. J. (Bellamy, J.) October 29, 1953]

[K.L. — Criminal Appeal No. 35 of 1953]

Road Traffic — Motor Vehicles (Construction and use) Regulations, 1948 — Using a vehicle on the road with inefficient brakes — Whether trial Judge can impart his own knowledge into the case.

This was an appeal against the conviction of the appellants on charges of offences under the Motor Vehicles (Construction and Use) Regulations, 1948. The questions raised on the appeal were: (a) whether any person can be guilty of the offence of permitting a vehicle to be used on a road with brakes which are not maintained in good and efficient working order and improperly adjusted; (b) whether there was sufficient evidence to show that the appellants had used the vehicle in contravention of the regulations.

Held: (1) there is no offence known to the law of permitting the use of a vehicle on a road in contravention of the provisions of Regulation 98, and therefore the conviction on the charge of "permitting" the vehicles to be so used must be set aside; (2) the evidence in this case did not show that the offence under Regulation 98